Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

SUELLEN SMITH,

Petitioner,

vs.

GORDON COUNTY and ALAN THERIAULT, in his Official Capacity as Gordon County Administrator,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court should reverse the Eleventh Circuit Court of Appeals Order reversing the District Court's denial of Respondents' Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50(a) and (b) on an issue raised *sua sponte* by the Circuit Court, which issue Respondents only raised by concession and waiver during the litigation, failed to object to the jury instruction and the District Court's ruling thereon, failed to object to Special Interrogatory jury form and Verdict thereon, failed to raise in Motions for Directed Verdict and Motion for Judgment as a Matter of Law, and failed to raise in the appeal to the Circuit Court on other issues.

II. Whether the Circuit Court's Order of reversal in the case sub judice is in direct conflict with both the spirit and the letter of Federal Rule of Civil Procedure 50(d) and this Court's ruling in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S. Ct. 1072 (1967), *reh. den.*, 386 U.S. 1027, 87 S. Ct. 1366 (1967), that the Petitioner should be granted a new trial when the reversal is based on an issue that was not raised at the trial of the case.

III. Whether the Circuit Court of Appeals in its order of reversal of the District Court's denial of Respondents' Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50(a) and (b) applied the proper standard of review or substituted its judgment on factual determinations for that of the District Court and jury verdict with special interrogatory.

IV. Whether the Circuit Court erred in holding that procedural due process pretermination notice and hearing requirements as set forth in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985), were satisfied when a public employer summarily terminated an employee with

a property interest in her employment because she filed a grievance for interpretation of Personnel Ordinance requirements when the employer requested her to do an act, without telling her that noncompliance would result in termination and she refused to comply without guidance.

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

Petitioner:

Suellen Smith

Respondents:

County of Gordon, Georgia and Alan Theriault in his official capacity as County Administrator

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Petitioner, Suellen Smith, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reproduced in the Appendix filed herewith ("App.") at 1(a). The unreported opinions of the district court in this case are reproduced in the Appendix at 8a, 10a, 13a, 15a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on January 21, 1997, and denied Petitioner's Petition for Rehearing on March 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The applicable provisions of the Constitution of the United States, Amendments V and XIV, are reproduced in the Appendix at 32a.

The pertinent portion of Federal Rules of Civil Procedure 50(a), (b) and (d) is set forth below:

> (a) Judgment as a Matter of Law.
>
> > (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may

determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal question raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment — and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law;

* * *

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT OF THE CASE

As secretary of the Gordon County building inspection department since January 1, 1989, Suellen Smith was an excellent, valued employee. As a permanent employee, she was entitled to protection of the Gordon County Personnel Ordinance and could only be terminated for cause. However, that Ordinance provided for no pre-termination notice and hearing and an employee could be fired "with no warning by the County Administrator."

Mrs. Smith's supervisor, Robert Hudgens, who valued her as an employee, attempted to obtain a promotion and pay

increase for her to meet an outside offer of employment, first from County Administrator McDearis, who referred him to the Gordon County Board of Commissioners, who referred Mr. Hudgens back to Mrs. McDearis.

Mrs. McDearis spoke with Mrs. Smith on Friday, November 1, 1991, and told her that she was authorized to offer the Grade 12 promotion at $320 per week.

On Monday, November 4, 1991, Mrs. Smith submitted a resignation to County Administrator McDearis, with an effective date of Friday, November 8, 1991.

On Monday, November 11, 1991, Mrs. Smith reported to work at her new job for a salary of $350 per week.

On November 12, 1991, after one day on the job without Mrs. Smith, Building Inspector Hudgens spoke separately with Personnel Director Francis Allen Carter and County Administrator McDearis about Mrs. Smith. He first asked Personnel Director Carter if Mrs. Smith's resignation had been processed and if her benefits were still in effect. Mrs. Carter told him the resignation had not been processed and that her benefits were still effective. He then went to speak with the County Administrator. He told her he wanted to offer Mrs. Smith her job back. Mrs. McDearis replied something to the effect of: "Do you think she will come back for what we offered her." Mr. Hudgens understood that she had given him authority to offer Mrs. Smith her job back with a promotion to Grade 12 with a salary increase.

On the morning of her second day on her new job, Tuesday, November 12, 1991, Mrs. Smith received a telephone call from Mr. Hudgens, who asked her if she would speak with him during her lunch hour. When she met Mr. Hudgens, he told her that he

wanted her to come back to work for Gordon County and that he had gotten authority from County Administrator McDearis to offer her "what they had offered her before," which Mr. Hudgens thought meant the Grade 12 promotion, and a raise in salary. He further told her that he had talked with Personnel Director Carter and that she had told him her resignation had not been processed.

Mrs. Smith told him that she would return if everything was in order, if insurance, retirement, performance evaluation, etc. were still effective.

Mr. Hudgens returned to Mrs. McDearis' office and told her that Mrs. Smith was coming back to work for the County. Mrs. McDearis just said she would need to talk with them. He then told Mrs. Carter that Mrs. Smith was coming back to work the next day. Mrs. Smith returned to her new job after lunch and that afternoon, Mr. Hudgens telephoned her again and told her that he had talked to County Administrator McDearis and Personnel Director Carter and told them that she was coming back to work on Wednesday, November 13, 1991. Mrs. Smith understood from the conversation that Mrs. McDearis had given her approval.

Mrs. McDearis denied that Mr. Hudgens had her approval prior to the rehire, and that he told her Mrs. Smith was coming back to work after the lunch meeting on Tuesday, November 12, 1991.

On November 13, 1991, Mrs. Smith reported back to work at the Gordon County Building Inspections Department. Mrs. Carter prepared and Mr. Hudgens signed a Personnel Action Form implementing Mrs. Smith's promotion to Grade 12 and a salary increase to $313.60 per week, which was computer processed the same day. Mr. Hudgens signed the form because

he understood that he had authority from Mrs. McDearis to do so. That same day, Mrs. Smith received a memo from Mrs. McDearis concerning the new employee insurance that was sent to all Gordon County employees covered thereby.

That afternoon, Mrs. McDearis telephoned and then came to the building department and spoke with Mrs. Smith about changing her job and decreasing her work load, which Mrs. McDearis said might affect Mrs. Smith's salary increase. At trial, Mrs. McDearis denied that meeting and conversation.

On payday, Friday, November 15, 1991, Personnel Director Carter took the employees' paychecks to Mrs. McDearis for her signature, with the Personnel Action form implementing Mrs. Smith's promotion and salary increase. Mrs. McDearis brought the form and Mrs. Smith's computer generated payroll check reflecting the increase back to Mrs. Carter and told her she had not approved the promotion and salary increase. She instructed Mrs. Carter to void the computer generated check and hand-type a payroll check to Mrs. Smith prorated for the three (3) days since she had returned to work, at her old salary of $290 per week. Mrs. Carter did so and revised the computer to reflect no salary increase nor promotion for Mrs. Smith. Mrs. Carter testified that Mrs. McDearis told her that she had not agreed to the promotion, that she had told Mr. Hudgens that they would "have to talk about this." Mrs. McDearis never said that Mrs. Smith was not an employee, just that the raise was not approved.

Mrs. Smith's paycheck for November 15, 1991 was signed by Mrs. McDearis, co-signed by the Chairman of the Board of Commissioners and given to Mrs. Smith. When she received the paycheck, Mrs. Smith noticed it was hand-typed and telephoned to ask why. She was told to meet Mrs. Carter in Mrs. McDearis' office.

Mrs. Smith went to Mrs. McDearis' office that afternoon and met with both Mrs. Carter and Mrs. McDearis. That meeting was the first time Mrs. McDearis told Mrs. Smith that she would have to fill out an application for her job. Mrs. Smith obtained a copy of the Gordon County Personnel Ordinance. Mrs. Carter and Mrs. McDearis told Mrs. Smith that advertisements for the job had run and job applications had been accepted.

Mrs. Smith asked if Mr. Hudgens could come to the meeting; he was called and he came. Mrs. Smith asked Mrs. Carter if anyone had been asked to do this before. Mrs. Carter answered: no. Mrs. Smith asked to be allowed to study the Personnel Ordinance over the weekend.

The Personnel Ordinance, in Article Two, Section V. Reinstatement, states in relevant part:

> An employee who resigns while in good standing or who is dismissed while in good standing or who is dismissed because of reduction in force may be reinstated within one year of the date of his separation, with the approval of the appointing department head and the County Administrator. . . .
>
> An employee who is reinstated shall be credited with previous service and previously accrued sick leave and shall receive all benefits provided in accordance with regulations and under supplementary rules and regulations. . . .

Nothing in the Personnel Ordinance required that the department head and County Administrator approve reinstatement (nor hiring) of an employee in writing.

Historically, approvals were verbal, without any written confirmation. Common practice was that personnel forms were signed by either the department head or the County Administrator, but not both. Nothing in the Personnel Ordinance provided that a rehired employee must submit an application to be rehired.

On Monday, November 18, 1991, Mrs. Smith told Mrs. McDearis and that she was still studying the Personnel Ordinance. Mrs. McDearis told Mrs. Smith to let her know by Friday, November 22, 1991, if she was going to fill out and turn in an application for her job.

On November 20, 1991, Mr. Hudgens spoke with Mrs. McDearis. He requested a meeting with the Board of Commissioners concerning Mrs. Smith's situation. Mrs. McDearis told him there would be no meeting; the Board "didn't want to hear it." Mr. Hudgens informed Mrs. Smith. Mrs. McDearis had "warned" the Board of Commissioners about the situation regarding Mrs. Smith. They were advised of the events as they happened.

With a lawyer's help, Mrs. Smith prepared a grievance requesting a clarification of her employment status.

The Personnel Ordinance, Article Two, Section VIII, provided for resolution of employment disputes, without reprisal. Grievance is defined in paragraph B thereof as:

> B. DEFINITION. A grievance is a complaint made by an employee concerning the interpretation or application of these regulations, county administrative regulations, departmental work rules, or disciplinary action affecting his employment with the County.

There were many applicants for the job; Mrs. Smith was not told that she would be retained in the job if she submitted the application. Mrs. Smith was never told that if she did not turn in an application for her job that she would be terminated.

On Friday, November 22, 1991, instead of filing the application for her job, Mrs. Smith filed a grievance, requesting a decision as to whether or not she was required to do so under the Personnel Ordinance. She took copies of the grievance to Personnel Director Carter and County Administrator McDearis that afternoon. Mrs. McDearis immediately met with the Board of Commissioners and gave them copies of Mrs. Smith's grievance. The Board of Commissioners made a decision on November 22, 1991, to direct Mrs. McDearis to fire Mrs. Smith instead of hearing the grievance.

Mrs. McDearis directed Mrs. Carter to prepare a Separation Notice for Mrs. Smith. The Separation Notice stated: "Resigned to accept employment with Raymond King Company", with the period of employment shown as from January 9, 1989 to November 15, 1991. Mrs. McDearis then took the Separation Notice and gave it to Mrs. Smith just before quitting time on Friday, November 22, 1991. Mrs. McDearis then went back to report she had done so at the meeting with the Board of Commissioners.

Since the Separation Notice did not state she had been terminated, Mrs. Smith came back to work on Monday morning, November 25, 1991. When Mrs. McDearis learned Mrs. Smith was at work, she instructed Mr. Hudgens to terminate Mrs. Smith. After initially refusing, Mr. Hudgens prepared and gave the termination letter to Mrs. Smith on November 25, 1991.

After receiving the termination letter, Mrs. Smith ran a backup on the computer, then left the building.

On Friday, November 22, 1991, Mrs. Smith had received her second paycheck since returning to work on November 13, 1991, which indicated payroll deductions for employee health insurance and the employee deferred compensation plan. The check stub indicated the total deferred compensation cumulative total uninterrupted since 1989.

Mrs. Smith was terminated without notice of charges or pre-termination hearing. Mrs. McDearis and the Gordon County Board of Commissioners took the position that Mrs. Smith was not entitled to a hearing. The Gordon County Personnel Ordinance did not provide for a pre-termination hearing. Mr. Hudgens wrote the Board of Commissioners, enclosed a copy of Mrs. Smith's grievance, and requested that they "look into" the matter. Mr. Hudgens got no response. Mrs. Smith got no hearing on her grievance.

Mrs. Smith filed her Complaint on November 10, 1993, alleging she had a property interest in her employment with Gordon County, and that her First Amendment and substantive and procedural due process rights were violated when she was discharged with no notice and hearing.

The First Amendment and substantive due process violations were voluntarily dismissed by Smith at the summary judgment stage of the litigation.

Gordon County filed a Motion for Summary Judgment on September 9, 1994, asserting that Smith did not have a property right to her job, because she had resigned and had never officially been reinstated. (App. 22a). The County Administrator asserted that she was entitled to qualified immunity. On October 13, 1994, Smith filed her Cross-Motion for Partial Summary Judgment on her procedural due process claim. (App. 15a).

By Order entered January 25, 1995, the District Court denied both motions with respect to the procedural due process claim, but granted the County Administrator qualified immunity. The District Court determined there was a material factual issue as to whether Smith had been reinstated. (App. 23a). The current County Administrator was also substituted in place of the originally named Jane Doe in the Complaint. The trial started on May 8, 1995, and ended on May 11, 1995. At the close of Petitioner's evidence, Respondent Gordon County "reserved" a Motion For Directed Verdict until the close of all evidence. At the close of all evidence Gordon County "renewed" the Motion For Directed Verdict based solely on the issues that Mrs. Smith was not entitled to due process because she had no property interest in the job, and that if she did, mandamus was an adequate state remedy. The issue that Mrs. Smith had received all the procedural due process to which she was entitled was not asserted. Mrs. Smith also moved for a directed verdict. The Court denied both motions.

The Court proposed a Jury Verdict form with the following Special Interrogatory:

> Had the plaintiff, Suellen Smith, been reinstated as an employee of Gordon County after her resignation.

The Court charged the jury that as a matter of law, Mrs. Smith was not provided with a hearing in compliance with due process requirements. Gordon County made no objection to the jury verdict form, nor any of the jury instructions.

The jury returned a verdict in favor of Mrs. Smith and awarded damages of $96,750.

Gordon County filed a Motion for Judgment as a Matter of

Law on May 19, 1995, again asserting that Mrs. Smith was not entitled to procedural due process because she had not been properly reinstated as an employee and that she had an adequate remedy under state law. The issue that Mrs. Smith had actually received all the procedural due process to which she was entitled was not raised.

The District Court denied Gordon County's Motion on November 8, 1995.

The final judgment on the jury verdict was entered on November 14, 1995. Gordon County filed this appeal on November 14, 1995. Oral argument before the Eleventh Circuit Court of Appeals was on August 30, 1996, during which the Court *sua sponte* raised the issue as to whether or not Petitioner had received all the pretermination process that she was due. On November 26, 1996, this Court requested supplemental briefs on the issue.

On January 21, 1997, the Circuit Court entered its Order reversing the District Court's denial of Respondent Gordon County's Motion for Judgment as a Matter of Law on the issue raised *sua sponte* during the oral argument.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to clarify for the Circuit Courts of Appeal what specific factors or guidelines should be applied to distinguish when remand and order for a new trial and not reversal is the appropriate determination where the issue upon which the Circuit Court rules is one which that court raised *sua sponte* during appeal. In *Singleton v. Wulff*, 428 U.S. 105, 121, 96 S. Ct. 2868, 2877 (1976), the Court declined to set forth specific guidelines for when remand is appropriate, with the result that some circuits have deprived the plaintiffs/

appellees of the opportunity to fully litigate their case on the issue raised by the appellate courts.

Without guidance from this Court on the issue, Circuit Courts are free to go behind a jury verdict with a special interrogatory and review the factual findings *de novo*, applying an erroneous standard on review.

Historically, appellate courts have refused to raise issues *sua sponte* unless the cases involved matters of "great public concern". *See Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355 (1984). The courts have been particularly loathe to raise those issues of a factual nature. *See United States v. Pinere*, 948 F.2d 698, 700 (11th Cir. 1991).

However, the Eleventh Circuit Court of Appeals' departure from traditional jurisprudence in this case raises the twin specters of appellate courts reweighing the evidence, a job traditionally reserved for the trial court, and fundamental unfairness to litigants by depriving them of the opportunity to present new or additional evidence on the very issue on which the court rested its holding.

An additional reason for granting the writ is to clarify for and create unity among the circuits to apply the proper standard of review, that is with a view of "all the evidence, together with all logical inferences flowing from the evidence in the light most favorable to the nonmoving party. . . ." *Walden v. United States Steel Corp.*, 567 F. Supp. 1443, 1446 (N.D. Ala. 1983), *citing Neff v. Kehoe*, 708 F.2d 638 (11th Cir. 1983); *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*).

The Circuit Court's refusal to follow the majority in applying a de novo standard to the review of the facts creates a result that is fundamentally contrary to the procedural due

process to which the Petitioner was entitled and deprives her of her right to the jury's determination.

Equally important for this Court is the need to establish clearly among the circuits that the holding in *Loudermill* firmly establishes that an employee who has a property interest in her job is constitutionally entitled to clear notice that she is about to be deprived of her property and equally entitled to some opportunity to respond, neither of which Petitioner received in this case.

I.

THIS COURT SHOULD REVERSE THE ELEVENTH CIRCUIT COURT OF APPEALS' ORDER REVERSING THE DISTRICT COURT'S DENIAL OF RESPONDENTS' MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 50(a) AND (b) BECAUSE IT WAS BASED UPON AN ISSUE RAISED *SUA SPONTE* BY THE COURT OF APPEALS, WHICH ISSUE RESPONDENTS ONLY RAISED BY CONCESSION AND WAIVER DURING THE LITIGATION, FAILED TO OBJECT TO THE JURY INSTRUCTION AND THE DISTRICT COURT'S RULING THEREON, FAILED TO OBJECT TO SPECIAL INTERROGATORY JURY FORM AND VERDICT THEREON, FAILED TO RAISE IN MOTIONS FOR DIRECT VERDICT AND MOTION FOR JUDGMENT AS A MATTER OF LAW, AND FAILED TO RAISE IN THE APPEAL TO THE CIRCUIT COURT ON OTHER ISSUES.

Whether to raise an issue *sua sponte* during appellate proceedings is within the discretion of the Circuit Court to be decided on a case-by-case, circuit-by-circuit basis. There is no general rule from the Supreme Court. *See Singleton v. Wulff*, *supra*, (criteria for *sua sponte* issue not found).

Generally the Circuit Court will not raise issues *sua sponte* that were not raised or were waived in the District Court, but has done so in matters of "great public concern". *See Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355 (1984).

But the Circuit Court has refused to exercise that discretion where the issue is of a factual nature. *See United States v. Pinere*, 948 F.2d 698, 700 (11th Cir. 1991). District Court's are not allowed to *sua sponte* raise issues in denying motions for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a) and (b), that were not raised by the movant in such a motion, and asserted in a motion for directed verdict at the close of evidence. *See Crawford v. Andrew Systems, Inc.*, 39 F.3d 1151 (11th Cir. 1994), *reh. and suggestion for rehearing en banc denied*, 49 F.3d 734 (11th Cir. 1995); *Mark Seitman & Assoc. v. R. J. Reynolds Tobacco Co.*, 837 F.2d 1527, 1531 (11th Cir. 1988).

Federal Rule of Civil Procedure 50(a) and (b) require that Motions for Directed Verdict be issue specific and only those issues raised may be utilized to grant a Motion For Judgment as a Matter of Law. *See Litman v. Massachusetts Mut. Life Ins. Co.*, 739 F.2d 1549, 1556-1557 (11th Cir. 1986); *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958, 967-968 (5th Cir. 1969); *House of Koscot Development Corporation v. American Line Cosmetics, Inc.*, 468 F.2d 64 (5th Cir. 1972); *Lightfoot v. Weis*, 213 F.2d 847 (5th Cir. 1954) (former Fifth Circuit precedent binds Eleventh Circuit prior to October 1, 1981 in *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*)); *Rochester Civic Theater, Inc. v. Ramsey*, 368 F.2d 748, 752 (8th Cir. 1988).

Failure to object to jury charges and Special Interrogatory Verdict forms, failure to assert an issue in the Answer, Consolidated Pretrial Order and failure to present evidence have

all resulted in waiver and abandonment of issues precluding appellate review. *See* Federal Rule of Civil Procedure 51, 49; *Osterneck v. E. T. Barwick Industries, Inc.*, 825 F.2d 1521, 1533 (11th Cir. 1987) (jury charges); *Litman v. Massachusetts Mut. Life Ins. Co.*, *supra*, at 1556-1557); *Fehlhaber v. Fehlhaber*, 681 F.2d 1015 (5th Cir. Unit B (former 5th Cir.) 1982) (not in pretrial) (adopted as Eleventh Circuit precedent by *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

In *Fehlhaber v. Fehlhaber*, *supra*, at 1030-1031 the court wrote:

> An issue not properly preserved for appeal will generally not be considered unless the issue is purely a legal one and the asserted error is so obvious that the failure to consider it would result in a miscarriage of justice. *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1145 (5th Cir. 1981), *cert. denied*, __ U.S. __, 102 S. Ct. 1630, 71 L. Ed. 2d 866 (1982). Here we find that neither prong of the "plain error" exception is met. First, this issue is thoroughly fact ridden. . . .

The *Fehlhaber*, *id.*, court continued to discuss the second prong of the "plain error" test, if the issue was fully and fairly litigated, "or, even if not litigated, if the attacking party had a full and fair opportunity to litigate the issue." *Id.* at 1031, that is sufficient.

Neither of these prongs of the "plain error" test are met in this appeal, and this Court should review the Circuit's decision to hold to that effect in order to clarify what the criteria is in all Circuits for appellate *sua sponte* issue consideration.

II.

THE CIRCUIT COURT OF APPEALS' ORDER IN THE CASE SUB JUDICE IS IN DIRECT CONFLICT WITH FEDERAL RULE OF CIVIL PROCEDURE 50(d) AND THE COURT'S HOLDING IN *NEELY v. MARTIN K. EBY CONSTRUCTION CO., SUPRA*, THAT THE APPELLEE SHOULD BE GRANTED A NEW TRIAL WHEN THE REVERSAL IS BASED ON AN ISSUE THAT WAS NOT RAISED AT THE TRIAL OF THE CASE.

In this case, the Court of Appeals reversed the District Court's denial of Respondents' Motion for Judgment as a Matter of Law on a issue which the Circuit Court raised *sua sponte* during the oral argument. In the Petition for Rehearing and Suggestion for Rehearing En Banc, Petitioner asked the court to reconsider its ruling or in the alternative, to grant the Petitioner a new trial at which she could present evidence on the dispositive issue. In declining to grant Petitioner's motion for a new trial, the Circuit Court ruled in a manner contrary to both the spirit and the letter of Federal Rule of Civil Procedure 50(d) and the majority of judicial opinions that generally hold that to deprive the plaintiff/appellee of the opportunity to retry the case on an issue that was not present in the first trial is fundamentally unfair and manifestly unjust, particularly when the issue rests solely on interpretation of the facts. *See Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S. Ct. 1072, 1080 (1967), *reh. den.*, 386 U.S. 1027, 87 S. Ct. 1366 (1967).

III.

THE CIRCUIT COURT OF APPEALS IN ITS ORDER OF REVERSAL OF THE DISTRICT COURT'S DENIAL OF RESPONDENTS' MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 50(a) AND (b) FAILED TO APPLY THE PROPER STANDARD OF REVIEW AND SUBSTITUTED ITS JUDGMENT ON FACTUAL DETERMINATIONS FOR THAT OF THE DISTRICT COURT AND JURY VERDICT WITH SPECIAL INTERROGATORY.

In reviewing a District Court's denial of a post-trial Motion for Judgment As A Matter of Law, the appellate court should view "all the evidence, together with all logical inferences flowing from the evidence, in the light most favorable to the non-moving party. . . ." *Walden v. United States Steel Corp.*, 567 F. Supp. 1443, 1446 (N.D. Ala. 1983), *citing Neff v. Kehoe*, 708 F.2d 638 (11th Cir. 1983), and *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*).

Boeing, *id.*, requires that the reviewing appellate court is bound by the jury's findings, especially in factual disputes.

In *Tate v. Government Employees Ins. Co.*, 997 F.2d 1433, 1435-1436 (11th Cir. 1993), the Circuit Court wrote:

> The standard of review employed in reviewing the district court's grant of a motion for judgment as a matter of law is the same as that the district court used to determine whether to grant the motion. "This determination is made by evaluating all of the evidence, together with logical inferences

> in the light most favorable to the party opposing the motion." *Adams v. Bainbridge-Decatur County Hosp. Authority*, 888 F.2d 1356, 1363 (11th Cir. 1989). A judgment as a matter of law "will not lie if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986) (standard for summary judgment mirrors that of directed verdict)."

The reversal order of the Circuit Court fails to apply that standard of review to this appeal. First, it would have been error for the District Court to grant the post-trial Motion for Judgment As a Matter of Law on issues not raised therein, nor in the Motion for Directed Verdict, for the Circuit Court has held no such authority exists on *sua sponte* raised issues. *See Crawford v. Andrews Systems, Inc., supra*; *Litman v. Massachusetts Mut. Life Ins. Co., supra.*

Second, the District Court would have erred to consider the issue *sua sponte* and grant the Respondents' Motion For Judgment as a Matter of Law, since the issue had not been raised. Yet, the Circuit Court by its Order is reversing the District Court's denial, requiring the District Court to grant Respondents' Motion, which the District Court had no authority to do on an issue raised *sua sponte*. The Circuit Court is doing the very thing that it has held the District Court has no authority to do. *See Crawford v. Andrew Systems, Inc., supra*; *Litman v. Massachusetts Mut. Life Ins. Co., supra.*

Third, if the proper standard of review is applied to this appeal, it is impossible to reach the conclusion of the Circuit

Court's reversal Order, that Mrs. Smith received all the procedural due process to which she was entitled. To do so, this Court could not have viewed the facts and inferences in a light most favorable to Mrs. Smith, as the law demands. Indeed, the undisputed evidence and jury verdict must be totally rejected to reach such a conclusion, which is not permitted in such an appeal. *See Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 80 S. Ct. 173 (1959); *Gallick v. Baltimore & OR Co.*, 372 U.S. 108, 83 S. Ct. 659 (1963).

IV.

THE CIRCUIT COURT ERRED IN HOLDING THAT PROCEDURAL DUE PROCESS PRETERMINATION NOTICE AND HEARING REQUIREMENTS AS SET FORTH IN *CLEVELAND BOARD OF EDUCATION v. LOUDERMILL, SUPRA*, WERE SATISFIED WHEN A PUBLIC EMPLOYER SUMMARILY TERMINATED AN EMPLOYEE WITH A PROPERTY INTEREST IN HER EMPLOYMENT BECAUSE SHE FILED A GRIEVANCE FOR INTERPRETATION OF PERSONNEL ORDINANCE REQUIREMENTS WHEN THE EMPLOYER REQUESTED HER TO DO AN ACT, WITHOUT TELLING HER THAT NONCOMPLIANCE WOULD RESULT IN TERMINATION AND SHE REFUSED TO COMPLY WITHOUT GUIDANCE.

The undisputed evidence during this trial was that Mrs. Smith was never told that if she did not comply with the County Administrator's request to file a new application she would be terminated. On holding that the "request" was notice of termination, the Circuit Court misunderstood the facts and misapplied the law of this Circuit and the Supreme Court, enunciated in *Cleveland Board of Education v. Loudermill*, wherein the Court held that some real form of pretermination

notice and opportunity to be heard was constitutionally mandated to comport with minimal due process requirements.

In *Kelly v. Smith*, 764 F.2d 1412, 1413 (11th Cir. 1985), there was no factual dispute, but to the opposite result. Kelly was told he would be fired if he failed to comply with his supervisor's order. When he failed, he was terminated after an opportunity to respond to his supervisor. Pretermination due process was satisfied.

Mrs. Smith was never given a clear directive: "Do it or be fired." The Personnel Ordinance did not state she was required to comply, but provided for her filing a grievance for an interpretation and direction, which Mrs. Smith did. This Court has erroneously held that filing the grievance with no termination notice prior thereto satisfied procedural due process requirements for a pretermination hearing or opportunity to respond to present the employee's side of the story, as required by *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985).

Procedural due process requires more than a pretermination "request". It requires notice of termination and some sort of a hearing, prior to the termination, neither of which Mrs. Smith received. She was summarily terminated and not even granted a consideration or hearing on her grievance. No post-termination hearing was provided.

The Circuit Court's reversal Order is contrary to procedural due process precedent of the Supreme Court and this circuit. *See id.*, *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 102 S. Ct. 1148 (1982); *Burch v. Apalachee Community Mental Health Services, Inc.*, 840 F.2d 797 (11th Cir. 1988) (*en banc*); *Fetner v. City of Roanoke*, 813 F.2d 1183 (11th Cir. 1983). This Court should hear and correct the error in the Circuit Court's Order of Reversal.

Other than as stated herein, the record below contains very little on the issue of whether Mrs. Smith received pre-termination notice and hearing sufficient to satisfy due process requirements. The reason is that Mrs. Smith contended that she had a property interest in her employment, and was entitled to procedural due process that had been denied. She relied on the holdings in *Cleveland Bd. of Educ. v. Loudermill, supra*; *Logan v. Zimmerman Brush Company, supra*; *Fetner v. City of Roanoke, supra*; *Burch v. Apalachee Community Mental Health Services, Inc., supra.*

It was undisputed during the trial that Mrs. Smith did not receive any sort of pre-termination or post-termination notice and hearing. Mrs. Smith, Mr. Hudgens — her supervisor, and County Administrator McDearis all testified that there was no notice, or hearing of any kind, pre-termination, or post-termination.

Respondents put no evidence or testimony in the record that could have established that Mrs. Smith received the pre-termination due process to which she was entitled, because there was none.

None of Respondents' motions made before, during, or after the trial were on the grounds that Mrs. Smith had received all the pre-termination process to which she was entitled.

When the trial court charged the jury that the court had found as a matter of law that Mrs. Smith had not received any type of hearing sufficient to satisfy due process. Respondents made no objection. No appeal was taken from that ruling or charge.

The Statement of Issues in Appellants' Brief (p. 1) does not raise the issue of whether Mrs. Smith received adequate procedural due process. Respondents' have consistently relied on one argument, that she was not entitled to due process because she had no property interest in her employment; but if she did, she should have pursued some State remedy.

However, the evidence adduced at trial established that Mrs. Smith had a property interest in her employment for which she was entitled to procedural due process. Further, the undisputed evidence established that she was given no pre-termination notice, or "any sort of a hearing" sufficient to satisfy pre-termination due process to which she was entitled.

At the time Mrs. McDearis requested Mrs. Smith to file an application, Mrs. Smith was not told that if she did not do so she would be terminated, and she did not know that. Nowhere in the record is that disputed. Neither is it disputed that she had no such notice of termination when she filed the Grievance requesting a clarification of interpretation of the Personnel Ordinance.

In *Kelly v. Smith*, 764 F.2d 1412, 1413 (11th Cir. 1985):

> Smith then informed Kelly that unless he agreed to work standby, Smith would be obligated to terminate Kelly's employment with the City. Kelly still declined to work standby and left the work site.

The *Kelly* court held that the employee had been given oral notice and an opportunity to present his side of the story before he was fired. Minimal pre-termination due process was satisfied. *Id.* at 1414.

But in this case, Mrs. Smith was *not* told she would be fired if she did not do something. She was fired for not doing it, after the fact, without pre-termination notice and an opportunity to present her side of the story.

The grievance cannot satisfy the pre-termination due process requirement because when she prepared and submitted it, she did not know she was going to be fired. She had received no notice to that effect. The grievance did not address termination; it asked for clarification of an interpretation of the Personnel Ordinance. To hold otherwise would subject anyone who files a grievance to summary dismissal without notice prior thereto.

It is important to consider that the *Kelly* court reversed the lower Court's ruling that a casual meeting with the City Manager after the termination did not satisfy post-termination due process requirements. *Id.* at 1415.

The *Kelly* court stated:

> However, the assurance that a full evidentiary hearing will be forthcoming is one of the primary reasons for allowing the abbreviated pre-termination procedures. *See*, *Loudermill*, *supra*, at __, 105 S. Ct. 1496, 84 L. E. 2d at 506. ("Our holding rests in part on the provisions in Ohio law for a full post-termination hearing.")

Id. at 1415.

In *Loudermill*, both employees had been given full evidentiary post-termination hearings, but the Court was addressing whether the pre-termination procedures were adequate. *Cleveland Bd. of Educ. v. Loudermill*, *supra*, 105 S. Ct. at 1495.

In this case, Mrs. Smith was not only denied pre-termination notice and hearing, but she was also denied post-termination notice and hearing of any kind. She was even refused a hearing or any consideration of the Grievance by Respondents.

Under these circumstances, Mrs. Smith was not afforded all the pre-termination due process to which she was entitled. She was not afforded *any*!

Respondents' argument in their Reply Brief In Support Of Defendants' Motion For Summary Judgment explained their position prior to the actual termination:

> Second, Defendants argue that they did not know Plaintiff would be terminated until the final day for acceptance of applications for her position. Plaintiff was a good employee, and Defendants did not have any other problem with Plaintiff or her performance of her duties. Until the last moment of submitting applications, Defendants fully anticipated that Plaintiff would apply for her old job and be reinstated. *Prior to that time, any pre-termination hearing would have been premature with nothing substantial to discuss, since there was not yet any reason to discharge the Plaintiff.*

(Emphasis added).

Even if Mrs. Smith's brief conversation with County Administrator McDearis about filing the application and filing the grievance could somehow be construed to satisfy pre-termination due process, the trial court should not be reversed because that issue was not raised by Respondents in the trial

court before, during, or after the trial in any of their motions. Further, the trial court's ruling and charge to the jury that no hearing sufficient to satisfy procedural due process was afforded Mrs. Smith was not objected to by Respondents. *See Cashie v. Harris Corp.*, 742 F. Supp. 1133 (M.D. Fla. 1990), *aff'd without opinion*, 930 F.2d 923 (11th Cir. 1990); *Therrell v. Georgia Marble Holdings Corp.*, 960 F.2d 1555 (11th Cir. 1992); *Cann v. Ford Motor Co.*, 658 F.2d 54 (2nd Cir. 1981).

And finally, not only did the Respondents not raise the issue or object below, it was not raised on appeal to the Circuit Court. Petitioner does not argue that the Circuit Court did not have the authority to consider issues not raised in the Trial Court but urges that such consideration was erroneous under the circumstances and facts of this case.

CONCLUSION

Petitioner respectfully urges this Court to reverse the Court of Appeals and uphold the District Court's Order.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MARCH 21, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9440

SUELLEN SMITH,

Plaintiff-Appellee,

versus

GORDON COUNTY, a county corporation ALAN THERIAULT, in his Official Capacity as County Administrator and Individually,

Defendants-Appellants,

THERESIA MCDEARIS, individually,

Defendant.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion_____, 11th Cir., 19__, __F.2d__).

Before: TJOFLAT and ANDERSON, Circuit Judges, and NANGLE*, Senior District Judge.

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* Honorable John F. Nangle, Senior U.S. District Judge for the Eastern District of Missouri, sitting by designation.

Appendix A

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ illegible
UNITED STATES CIRCUIT JUDGE

ORD-42

(6/95)

APPENDIX B — JUDGMENT REVERSING DISTRICT COURT JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 21, 1997

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9440

District Court Docket No. 4:93-CV-325

SUELLEN SMITH,

Plaintiff-Appellee,

versus

GORDON COUNTY, a county corporation, ALAN THERIAULT, in his Official Capacity as County Administrator and Individually,

Defendants-Appellants,

THERESIA McDEARIS, Individually,

Defendant.

Appeal from the United States District Court
for the Northern District of Georgia

Before TJOFLAT and ANDERSON, Circuit Judges, and NANGLE*, Senior District Judge.

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* Honorable John F. Nangle, Senior U. S. District Judge for the Eastern District of Missouri, sitting by designation.

Appendix B

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED;

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendants-appellants the costs on appeal to be taxed by the Clerk of this Court.

Entered: January 21, 1997
For the Court: Miguel J. Cortez, Clerk

By: s/ illegible
Deputy Clerk

ISSUED AS MANDATE: 4/18/97

APPENDIX C — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 21, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9440

D. C. Docket No. 4:93-CV-325-HLM

SUELLEN SMITH,

Plaintiff-Appellee,

versus

GORDON COUNTY, a county corporation, ALAN THERIAULT, in his Official Capacity as County Administrator and Individually,

Defendants-Appellants,

THERESIA McDEARIS, individually,

Defendant.

Appeal from the United States District Court
for the Northern District of Georgia

(January 21, 1997)

Before TJOFLAT and ANDERSON, Circuit Judges, and NANGEL*, Senior District Judge.

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* Honorable John F. Nangle, Senior U. S. District Judge for the Eastern District of Missouri, sitting by designation.

Appendix C

PER CURIAM:

Oral argument was heard in this case on August 30, 1996. At that time, the court *sua sponte* raised the question as to whether or not plaintiff had received all the pretermination process that she was due. The court ordered supplemental briefing on that issue. After a careful review of the record in this case, including the supplemental briefs, it is manifestly clear that plaintiff received all of the pretermination[1] process that she was due under the Constitution. It was clear to plaintiff that the county was requiring that she fill out the application form. She was told by the county officials with the relevant authority and also by others that this must be done. She was given a deadline for filling out the application. Indeed, before the deadline plaintiff filed a grievance complaining about the necessity of filling out such an application. When she failed to fill out the application form as of the end of the deadline day, she was terminated (i.e., she was denied reinstatement to her previous position).

The law is well established that a formal pretermination hearing is not necessary. All that is necessary is "oral notice and an opportunity to respond orally." *Kelly v. Smith*, 764 F.2d 1412, 1414 (11th Cir. 1985). *See also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). In this case, plaintiff was told that it was necessary for her to complete the application form. Plaintiff had ample opportunity to respond. Before her termination, she responded orally to County Administrator McDearis on more than one occasion, and she responded once in writing, i.e., her grievance. The instant record is clear that

---

1. Plaintiff did not challenge the adequacy of the post-termination process under the county ordinance and state law.

plaintiff was afforded all of the pretermination process that she was due.

Accordingly, the judgment of the district court is reversed.

REVERSED.

APPENDIX D — JUDGMENT IN A CIVIL CASE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA FILED NOVEMBER 14, 1995

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

CASE NUMBER: 4:93-cv-325-HLM

SUELLEN SMITH

Plaintiff

V.

GORDON COUNTY, a County Corporation; ALAN THERIAULT, in his official capacity as County Administrator

Defendant

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

* * *

IT IS ORDERED AND ADJUDGED that the plaintiff, SUELLEN SMITH recover of the defendants, GORDON COUNTY, a County Corporation and ALAN THERIAULT, in his official capacity as County Administrator, the sum of NINETY SIX THOUSAND SEVEN HUNDRED FIFTY AND NO/100 DOLLARS ($96,750.00) with interest at the rate as provided by law, and her costs of the action.

Appendix D

November 14, 1995
Date

LUTHER D. THOMAS
Clerk

s/ Vivian VanLandiugham
(By) Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION FILED NOVEMBER 8, 1995

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

CIVIL ACTION 4:93-cv-325-HLM

Suellen Smith

Plaintiff,

v.

Gordon County, et al.,

Defendants.

ORDER

This case is before the Court on Defendants' Motion for Judgment as a Matter of Law [42] and Plaintiff's First Motion for Attorney's Fees and Litigation Expenses [45].

I. Defendants' Motion for Judgment as a Matter of Law [42]

Defendants argue that the Court should overturn the jury's verdict in this case because Plaintiff had no property right in her employment. This is so, Defendants contend, because Plaintiff never completed a written "application" for re-employment with Defendant County and county officials did not select Plaintiff from a list of qualified applicants. Defendants contend these acts are statutory prerequisites to employment with Defendant County.

This argument is flawed for a number of reasons. Foremost of these is that the county ordinance upon which Plaintiff's property right is based does not *require* new applicants to complete written applications. The Court concludes that the submission of a written application is probably a customary part of the application process, but it is not a prerequisite to employment. Even if the ordinance could be read to require a written application for new employees, moreover, it would not require such for former employees who were merely being "reinstated." *Compare* Gordon County Ordinance Establishing Personnel Rules and Regulations Article Two, § 3 and 5.[1] Finally, the Court concludes that even if a written application was statutorily required, it was a procedural requirement only, not a substantive one. Thus, the County had authority to, and the jury found that it did, rehire Plaintiff despite the lack of a written application.

For these reasons and others, the Court concludes Plaintiff had a property right in her employment that Defendants took without Due Process. The Court denies Defendants' Motion.

---

1. The Court notes that the reasoning above could be interpreted as at odds with some of the dicta in the Court's Order granting Defendant McDearis qualified immunity. It is not, however, at odds with that Order's holding: no clearly established law existed indicating that a Gordon County Administrator's decision to fire a newly hired county employee for failing to fill out a written application was a violation of Procedural Due Process. Put another way, "a reasonable official in Defendant[ ] [McDearis's] circumstances could believe that Defendant[ ] [McDearis's] duties under the Ordinance required that Plaintiff complete an application before she could be reinstated." *Suellen Smith v. Gordon County*, No. 93-325, at 19 (N.D. Ga. Jan. 25, 1995). *See Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc) ("Qualified immunity protects government officials performing discretionary functions from civil trials . . . and from liability if their conduct violates no 'clearly established . . . constitutional rights of which a reasonable person would have known.' ").

Appendix E

II. Plaintiff's First Motion for Attorney's Fees and Litigation Expenses [45].

Plaintiff moves the Court for attorney's fees and expenses. Defendants oppose this request, but ask the Court to allow them to submit their substantive arguments after the Court rules on their Motion for Judgment as a Matter of Law.

Defendants' request is reasonable. The Court orders Defendants to file a brief detailing their substantive objections to Plaintiff's Motion within ten (10) days of this Order's filing date. Plaintiff will then have ten (10) days in which to reply. The Court will then consider Plaintiff's Motion.

III. Conclusion

Accordingly, the Court **denies** Defendants' Motion for Judgment as a Matter of Law [42], **defers** Plaintiff's First Motion for Attorney's Fees and Litigation Expenses [45] and **directs** the Clerk to resubmit this case twenty days from this Order's filing date.

IT IS SO ORDERED, this the 8th day of November, 1995.

s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX F — ORDER AMENDING ORDER FILED JANUARY 25, 1995 OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION FILED JANUARY 26, 1995

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

CIVIL ACTION 4:93-cv-325-HLM

SUELLEN SMITH,

Plaintiff,

v.

GORDON COUNTY, GEORGIA, JANE DOE, in her official capacity as County Administrator, and THERESIA MCDEARIS, individually,

Defendants.

ORDER

This civil rights case is before the Court on its own motion.

While it was clear from the body of the January 25, 1995 order, the Court omitted from the concluding paragraph that it was denying Plaintiff's Motion for Partial Summary Judgment.

Accordingly the Court **AMENDS** the January 25, 1995 order by adding to the concluding paragraph "and **DENIES** Plaintiff's Motion for Partial Summary Judgment."

Appendix F

IT IS SO ORDERED, this the 26th day of January, 1995.

s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION FILED JANUARY 25, 1995

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

CIVIL ACTION 4:93-cv-325-HLM

SUELLEN SMITH,

Plaintiff,

v.

GORDON COUNTY, GEORGIA, JANE DOE, in her official capacity as County Administrator, and THERESIA MCDEARIS, individually,

Defendants.

ORDER

This civil rights case is before the Court on Defendants' Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment.

BACKGROUND

Defendant Gordon County hired Plaintiff Suellen Smith as a secretary in the Department of Building Inspections. Plaintiff's department head was Robert Hudgens. Defendant Theresia McDearis was the County Administrator when Plaintiff was terminated. When Mr. Hudgens hired Plaintiff, she was given a copy of the Gordon County Employee Handbook.

Appendix G

The handbook summarizes relevant provisions of the Gordon County Ordinance Establishing Personnel Rules and Regulations (hereafter Ordinance). The Gordon County Commission enacted the Ordinance, which established a civil service system. Plaintiff's position was subject to the civil service system. The Ordinance provides, *inter alia*: that permanent employees are entitled to appeal disciplinary action to the County Commission; that permanent employees who resign while in good standing may be re-appointed within one year with approval of their department head and the County Administrator; and a grievance procedure.

Plaintiff presented a letter of resignation to Defendant McDearis on November 4, 1991, effective on November 8.[1] Plaintiff began another job on November 11. Mr. Hudgens failed to provide Defendant McDearis with the notice of a vacancy required by the Ordinance. Nevertheless, because Plaintiff tendered her resignation to Defendant McDearis and Defendant knew of the vacancy, Defendant began recruitment and selection of a replacement. She advertised the position and began accepting applications.

Ms. Joan Beitt, another county employee, was to have acted temporarily as Mr. Hudgens' secretary, but then changed her mind. After Ms. Beitt declined the position, Mr. Hudgens decided to approach Defendant McDearis and Plaintiff about Plaintiff returning. Before lunch on November 12 Mr. Hudgens approached Defendant about Plaintiff returning and Defendant asked "Do you think she would and be happy with what we

1. Plaintiff makes much of the facts that her name had not been removed from the computerized payroll and separation papers had not been completed. These facts are irrelevant, because a resignation is effective when accepted, not when the paperwork is complete. *See* O.C.G.A. § 45-5-1(a)(2).

offered her?" Mr. Hudgens then told Defendant "I'm going to call her and I'll let you know." Mr. Hudgens interpreted the exchange as authorization to rehire Plaintiff.

During a lunch meeting on November 12 Mr. Hudgens discussed with Plaintiff returning to her position, and told her that Defendant had authorized him to offer her the position, and that she would receive a raise and promotion. Plaintiff agreed to return.

During the afternoon of November 12 Mr. Hudgens again spoke with Defendant McDearis. He told Defendant that Plaintiff was willing to return, to which Defendant said she would like to talk to Mr. Hudgens and the Personnel Director. After this conversation Mr. Hudgens told the Personnel Director that Plaintiff was returning to work. Plaintiff returned to work at the County on November 13. Plaintiff believed that Mr. Hudgens had the power to re-hire her, and Mr. Hudgens believed that Defendant McDearis approved his rehiring Plaintiff. On November 14 the Personnel Director presented the payroll change form for Plaintiff's raise and promotion to Defendant, who refused to approve it. Both Mr. Hudgens and the Personnel Director signed the form.

On several occasions from November 13 until November 22 Defendant McDearis "request[ed] Plaintiff fill out an application for employment in order to be reinstated to her former position." Defendants' Statement of Undisputed Material Facts ¶ 11; Plaintiff's Consolidated Response to Defendants' Statement of Undisputed Material Facts, and Statement of Material Facts in Dispute ¶ 11. Defendant explained that the county had already advertised her job. On the November 15 Plaintiff received a pay check signed by Defendant McDearis,

covering the period from November 8 through November 15, less two days.

On November 18 Defendant McDearis told Plaintiff to fill out the application by Friday November 22. On Thursday November 21 Plaintiff filed a grievance taking the position that no application was necessary and requesting a confirmation of her employment status. At 5:00 pm on November 22 Defendant McDearis gave Plaintiff her separation papers.

After filing her grievance on November 21 and being terminated on November 22 Plaintiff took no more action before filing the instant law suit. Defendants did not give Plaintiff a hearing before terminating her on Friday November 22. Defendants did not process Plaintiff's grievance because they believed Plaintiff was not a permanent employee, and therefore, not entitled to grieve personnel decisions.

STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) authorizes summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." The moving party bears the heavy burden of demonstrating that no dispute as to any material fact exists. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). This burden is met by "pointing out to the District Court — that there is an absence of evidence to support [an essential element of] the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). This initial burden remains with the moving party even when the issue involved is one on which the non-movant will bear the burden of proof at trial. *Russ v. International Paper Co.*, 943 F.2d 589, 592 (5th Cir. 1991).

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Once the moving party has fulfilled its burden and shown that no factual issues exist which could warrant a trial, the burden shifts to the non-movant to come forward with specific facts showing that a genuine dispute still does exist. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Clark v. Coats & Clark Inc.*, 929 F.2d 604 (11th Cir. 1991). This burden shifts back to the non-moving party, however, *only* after the moving party meets its initial burden and shows that no factual issues remain for trial. *Russ*, 943 F.2d at 592. If the moving party does not meet its initial burden, the non-movant is not obligated to put forward additional evidence.

The District Court's duty is to view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *See Bradbury v. Wainwright*, 718 F.2d 1538, 1543 (11th Cir. 1983). In deciding a motion for summary judgment, it is not the Court's function to decide issues of genuine material fact. Rather, the Court's function is to determine whether such an issue exists to be tried. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Warrior Tombigbee Transportation Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983). It is the applicable substantive law which identifies what facts are material. *Anderson*, 477 U.S. at 248. Facts which in good faith are disputed, but which do not resolve or affect the outcome of the suit will not properly preclude the entry of summary judgment. *Id.* In short, such facts are not material. The materiality of a fact rests solely on the governing substantive law. A district court "can only grant summary judgment 'if everything in the record . . . demonstrates that no genuine issue of material fact exists.' " *Tippens v. Celotex Corp.*, 805 F.2d 949, 952 (11th Cir. 1986), (quoting *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980)).

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Genuine disputes are those where the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson*, 477 U.S. at 248. Moreover, for factual issues to be "genuine" they must have a real basis in the record. *Matsushita*, 475 U.S. at 587. The nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Id.* at 586 (citations omitted.) "[T]his standard mirrors the standard for a directed verdict . . . . [T]he inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

PROCEDURAL DUE PROCESS

Legal Principles

Whether a guarantee of employment sufficient to create a property interest "has been given can be determined only by an examination of the particular statute or ordinance in question." *Bishop v. Wood*, 426 U.S. 341, 345 (1976). "A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law." *Bishop v. Wood*, 426 U.S. 341, 344 (1976). "In the context of public employment, the entitlement is generally created, if it is created at all, by state statute or individual contract." *Schneider v. Indian River Community College Foundation, Inc.*, 875 F.2d 1537, 1544 (11th Cir. 1989) (citing *Bishop*, 426 U.S. 341).

"Less formal evidence of a property interest is acceptable if it shows 'mutually explicit understandings,' which may be

implied from the circumstances of the employment." *Id.* (citing *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972)).[2] "But such understandings or tacit agreements must support 'a *legitimate* claim of entitlement' under 'an independent source such as state law . . .' " *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 224 n.10 (1985) (emphasis supplied). Mutual understandings cannot create a property interest contrary to state law. *Warren v. Crawford*, 927 F.2d 559, 564 (11th Cir. 1991) (citing *Batterton v. Texas Gen. Land Office*, 783 F.2d 1220, 1224 (5th Cir.), *cert. denied*, 479 U.S. 914 (1986)), *overruled in part by, McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).

The creation of a merit system, in which an employee participates, creates a protected property interest. *Barnett v. Housing Auth. of Atlanta*, 707 F.2d 1571, 1576 (11th Cir. 1983); *Wayne*, 210 Ga. App. at 754; *Clark & Stephenson v. State Personnel Bd.*, 252 Ga. 548, 550 (1984).

The requirements of procedural due process must be met before an individual may be deprived of a property interest. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). "A 'tenured employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence,

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2. The plaintiffs in *Schneider* participated in a pension plan subject to vesting in ten years, received a employment handbook referring to employment as Career Service, and argued that there was an unwritten custom or law of continued employment. There was also a statute requiring the defendant to hire pursuant to written contract. The court of appeals held the unwritten custom or policy was not a mutually explicit understanding such as the informal tenure system in *Perry*. This Court notes that, under the facts of *Perry*, a tenure system, informal or formal, would not have violated the law since the Texas university system had a tenure system. *See Perry*, 408 U.S. at 600.

and an opportunity to present his side of the story' before [the county] may terminate an employee." *McKinney v. Pate*, 20 F.3d 1550, 1561 (11th Cir. 1994) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)). The employee is entitled to some type of pre-termination hearing, which hearing need not be a mini-trial, but only an "initial check against mistaken decisions."

Relevant Georgia Law

"Powers of all public officers are defined by law and all persons must take notice thereof. The public may not be estopped by the acts of any officer done in the exercise of an unconferred power." *Tate v. Teachers Retirement System*, 257 Ga. 365, 366 (1987); *Drost v. Robinson*, 194 Ga. 703, 710-11 (1942); O.C.G.A. § 45-6-5.

A public employee's presence at work can create factual issues regarding whether she is employed. *See Allen v. Lankford*, 170 Ga. App. 605, 607 (1984) (discussing whether employee abandoned employment). Receipt of pay checks may create an issue of fact as to whether a public employee resigned or abandoned her job. *See Atlanta v. League of Women Voters*, 244 Ga. 796, 799 (1979) (holding checks irrelevant because issue was not resignation or abandonment, but cessation of duties).

Discussion

Defendants argue that Plaintiff relinquished any property interest in her job when she resigned. Defendants argue that Plaintiff was never reinstated because Defendant McDearis never approved her reinstatement because Plaintiff refused to complete an application. Defendants argue that from November 13 to

November 22 she was a "temporary" employee. Plaintiff argues that she was a permanent employee entitled to pre-termination notice and hearing. She argues that Defendant McDearis gave Mr. Hudgens permission to rehire Plaintiff. Plaintiff also argues that Defendants' characterization of her as a "temporary" employee is not a status permitted by the Ordinance.

The Court concludes that questions of fact remain as to whether Plaintiff had been reinstated, and was therefore a permanent employee. Facts in Plaintiff's favor include: she worked ten days after Mr. Hudgens asked her to return, she received a paycheck reflecting no break in benefits, and Mr. Hudgens testimony that Defendant McDearis approved Plaintiff's return to work. The Court concludes that Mr. Hudgens' expressed belief regarding Defendant's approval and his authority cannot in themselves create a property interest in employment. Facts in Defendants' favor are that Defendant McDearis told Plaintiff at least as early as November 14 (the day after her return on November 13), and possibly on November 13 that the position had been advertised and Plaintiff must complete an application before she could be reinstated.

The Court concludes that a jury question exists as to whether Defendant McDearis approved Plaintiff's reinstatement by allowing her to work and giving her a paycheck. Or, on the other hand, Defendant, *ab initio,* conditioned her approval of Plaintiff's reinstatement upon Plaintiff formally applying for the job.

Defendants have also argued that *Mckinney v. Pate* and *Narey v. Dean* mean that, because the Georgia certiorari procedure was available, Plaintiff's rights have not been violated. Plaintiff argues that in both cases the employee received

some pre-termination hearing. The Count declines to read *McKinney* and *Narey* to eliminate the requirement that employees with a property interest be given a *pre-termination* hearing.

QUALIFIED IMMUNITY

Principles of Federal Law

"Qualified immunity protects government officials performing discretionary functions from civil trials (and the other burdens of litigation, including discovery) and from liability if their conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known." *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (citations omitted). Qualified immunity means that government agents are not always required to err on the side of caution. *Davis v. Scherer,* 468 U.S. 183, 196 (1984).

Qualified immunity usually protects government actors; "only in exceptional cases will government actors have no shield against claims made against them in their individual capacities." *Lassiter*, 28 F.3d at 1149 (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) (officials "generally are shielded from liability for civil damages")). "Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit." *Id.* The en banc Eleventh Circuit warned: "Because qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripping defendants of immunity." *Id.*

"Clearly established law" which strips the government agent of immunity requires that "the law must have earlier been

developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." *Id.* "Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases." *Id.*

Plaintiffs cannot discharge their burden by referring to general rules and to the violation of abstract "rights." *Id.* "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir.1993), modified, 14 F.3d 583 (11th Cir.1994) (quoted in *Lassiter*, 28 F.3d at 1150). "The line is not to be found in abstractions — to act reasonably, to act with probable cause, and so forth — but in studying how these abstractions have been applied in concrete circumstances." *Barts v. Joyner*, 865 F.2d 1187, 1194 (11th Cir.) (quoted in *Lassiter*, 28 F.3d at 1150), *cert. denied*, 493 U.S. 831 (1989).

"When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar. Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases." *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d, 1563, 1573, 1575 (11th Cir.1992), (Edmondson, J., dissenting), *approved en banc*, 998 F.2d 923 (11th Cir.1993) (quoted in *Lassiter*, 28 F.3d at 1150). "Pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." *Lassiter*, 28 F.3d at 1150.

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The government actor's subjective intent is irrelevant; "objective legal reasonableness is the touchstone." *Id.*

Qualified immunity is separate and distinct from the merits of the case; therefore, "immunity contemplates exemption from liability that would otherwise exist on the merits." *Id.* at 1551.

Relevant Georgia Law

"All offices in the state shall be vacated: . . . By resignation, when accepted; . . . O.C.G.A. § 45-5-1(a)(2). "Upon the occurrence of a vacancy in any office in the state, the officer . . . authorized to fill the vacancy . . . shall do so without the necessity of a judicial determination of the occurrence of the vacancy . . ." O.C.G.A. § 45-5-1(b). Counties may, by ordinance or resolution, create a civil service system. O.C.G.A. § 36-1-21(a). County positions subjected to the civil service system cannot be removed from coverage. O.C.G.A. § 36-1-21(b). "A civil service system created pursuant to the authority of this Code section *shall* be administered in such manner and pursuant to such rules and regulations as may be provided for by resolution or ordinance of the county governing authority which created the system." O.C.G.A. § 36-1-21(c) (emphasis supplied).

The County Administrator of Gordon County "shall be responsible for the administration of" the personnel policies. Ordinance Art. One, § II. "The County Administrator *shall* publicize opportunities for employment with the governmental unit and shall recruit, select, appoint, and promote employees in such a manner as to promote equal opportunity for all persons, without regard to sex, race, color, religion, national origin, or political affiliation." Ordinance Art. Two, § II.

"The County Administrator shall conduct such programs

of advertising and recruitment as are necessary in order to provide *applicants* for the position who meet employment standards. Announcements of vacancies should include information necessary to identify the position, a brief statement of requirements necessary to perform the work at the entry level, and instructions on how to apply for the vacant position." Ordinance Art. Two, § III.C. (emphasis supplied). "As far as practical, vacancies *shall* be filled by promotion of employees in the county service. To this end, all vacancies above the entry level of any occupational category shall be announced to county employees." *Id.* (emphasis supplied).

"The County Administrator shall be responsible for insuring that *every application for a vacant position is reviewed* for the purpose of determining whether the applicant meets the established employment standards. *Applicants may be requested to furnish information or evidence as is necessary to make such determination. Applicants also may be required by reasonable means* to demonstrate in what manner or to what extent they meet the employment standards. Applicants meeting employment standards will be referred to the employing department head. The *department head must select an employee from the applicants* referred and shall inform the County Administrator of his recommendation as soon as he makes a decision." Ordinance Art. Two, § III.D. (emphasis supplied).

"The County Administrator shall either accept or reject the recommendation of the department head as to *which applicant* should be employed." Ordinance Art Two, § III.E.

Such records of the above activities *shall* be prepared and maintained as are necessary for general business purposes and in order to meet equal opportunity objectives and requirements.

Ordinance Art Two, § III.F; *see* 29 C.F.R. § 1602.14; *see generally* 29 C.F.R. § 1602 (Recordkeeping and Reporting Requirements Under Title VII and the ADA).

"An employee who resigns while in good standing . . . *may be* reinstated within one year of the date of his separation, with the approval of the appointing department head and the County Administrator. Ordinance Art. Two, § V. A reinstated employee will receive accrued benefits and the same salary she received during her previous employment. *Id.* (emphasis supplied).

Discussion

Defendant McDearis argues that the law was not clearly established that Plaintiff's rights were violated by requiring her to complete an application to be reinstated. Plaintiff simply argues that the law of procedural due process was clearly established at the time of these incidents.

Pursuant to state law, Plaintiff's position was vacant when Defendant accepted her resignation. The Ordinance clearly requires that a vacant position be filled only after certain procedures are followed, including the taking of applications. The Ordinance states "[t]he County Administrator shall be responsible for insuring that *every application for a vacant position is reviewed* for the purpose of determining whether the applicant meets the established employment standards." Moreover, the Ordinance required Defendant to fulfill record keeping duties pursuant to general business purposes and federal regulations. Applications are among the records federal law requires.

The Court concludes that, even if Defendant approved Plaintiff's *rehiring*, such did not automatically entitle Plaintiff

to be *reinstated*, or in other words, entitle her to permanent employee status. The ordinance says the employee "may be" reinstated, not "shall" be reinstated. The Court concludes the Plaintiff's reinstatement as a permanent employee must be approved. The Court concludes that Defendant made it clear from the time Plaintiff returned that, because of the Ordinance's mandatory application requirements for filling vacant positions and the advertisement of Plaintiff's vacated position, Plaintiff must complete an application to be reinstated.

The Court concludes, therefore, that Defendant McDearis is entitled to qualified immunity. Georgia law and the Gordon County Ordinance required Defendant to adhere to certain personnel procedures, which required vacant positions to be advertised and filled from a pool of applicants.[3] The Court concludes that a reasonable official in Defendant's circumstances could believe that Defendant's duties under the Ordinance required that Plaintiff complete an application before she could be reinstated.

Even *if* a jury ultimately finds that Plaintiff was a permanent employee, such finding would not deprive Defendant of qualified immunity. Plaintiff, recognizing the importance of Defendant's approval for — i.e., prior to — reinstatement, relies heavily on Mr. Hudgens' testimony that Defendant authorized him to reinstate Plaintiff.[4] Mr. Hudgens' belief was based upon

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3. Plaintiffs argue that the Ordinance was not followed because Mr. Hudgens failed to properly notify Defendant of the vacancy. The Court concludes that Mr. Hudgens' failure does not, and did not, prevent Defendant from performing her duties.

4. The Court notes that the other factors relied upon by Plaintiff — the paycheck and her attendance at work — occurred after Defendant explicitly informed Plaintiff of the application requirement.

Defendant's inquiry of him in response to his request to ask Plaintiff to return; "Do you think that she would come back for what we've offered?" The Court concludes that neither this question nor anything else in the record dispute Defendant's testimony that her approval of Plaintiff's reinstatement was conditioned upon Plaintiff completing an application. In short, the Court concludes that Mr. Hudgens' interpretation of Defendant's question does not dispute Defendant's testimony. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990) (holding that court may not "assum[e] that general averments embrace the "specific facts" needed to sustain the complaint"). The Court concludes that a reasonable official in Defendant's circumstances could believe that, although Plaintiff worked and received a pay check, the employee's ultimate reinstatement to the vacated permanent position could be conditioned upon completing an application.

The Court concludes that Defendant is entitled to qualified immunity because, taking the facts in the light most favorable to Plaintiff, Georgia law does *not* clearly establish that Plaintiff was a permanent employee. Furthermore, in light of the Ordinance, the law is not clearly established that Plaintiff *could* be reinstated as a permanent employee without applying for the vacant position. The Court notes that this issue was the crux of Plaintiff's grievance. The Court concludes, because of her duties under the Gordon County Ordinance and her undisputed concerns about employment laws, Defendant was "not . . . required to err on the side of caution." The Court concludes, therefore, that although a jury may ultimately conclude, on the merits, that Plaintiff in fact was a permanent employee, Defendant could reasonably believe that she could, and did, withhold approval because Plaintiff refused to complete an application.

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CONCLUSION

Accordingly the Court **DENIES in part** and **GRANTS in part** Defendants' Motion for Summary Judgment. The Court **DENIES** the motion as to Gordon County and Jane Doe in her official capacity as County Administrator and **GRANTS** the motion as to Theresia McDearis.

IT IS SO ORDERED, this the 25th day of January, 1995.

s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX H — CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.